

**REDACTED DECISION -- 07-492 C & 07-493 W -- BY R. MICHAEL REED,  
CHIEF ALJ -- SUBMITTED for DECISION on JANUARY 17, 2008 -- ISSUED on  
MAY 6, 2008**

## **SYNOPSIS**

**CONSUMERS' SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** -- Under the legislatively approved regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers' sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

Accordingly, a person who, as here, was an officer of a corporation in name only, that is, a person who did not in fact have the responsibility of performing any managerial duties, is not personally liable, under W. Va. Code § 11-15-17 [1978] and the implementing regulations, for an unpaid consumers' sales and service tax liability of the corporation.

**WITHHOLDING TAX -- LIABILITY FOR "MONEY PENALTY" (TAX) AS A PERSON "REQUIRED" TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO "WILLFULLY" FAILED TO DO SO** -- Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil "money penalty" (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) he or she was "required" to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she "willfully" failed truthfully to perform these responsibilities on behalf of the corporation.

A person was "required" to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

The term "willfully" failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation's default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

Accordingly, a person associated with the corporation is not personally liable for the unpaid withholding tax liability of the corporation if, as here, one or both of the two requirements for personal liability is/are lacking.

## **FINAL DECISION**

On July 10, 2007, the Director of the Compliance “Division” of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a consumers’ sales and service tax assessment against the Petitioner, as an Officer of the Corporation. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the months of March, 1997, through July, 2000, and for the months of September, 2000, through December, 2000, for tax of \$\_\_\_\_\_, interest, through July 10, 2007, of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_, for a total assessed liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner on July 11, 2007.

Also, on July 10, 2007, the Commissioner (by the “Division”) issued a withholding tax “money penalty” assessment against the Petitioner, as a person allegedly responsible on behalf of the Corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the three calendar-quarterly periods ended June 30, 2000, through December 31, 2000, for a “money penalty” (tax) and total assessed withholding tax liability of \$\_\_\_\_\_. Written notice of this assessment was served on the Petitioner on July 11, 2007.

Thereafter, by mail postmarked September 07, 2007, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment

with respect to each tax assessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petitions was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003) (this tribunal had granted a timely request of the Petitioner for a postponement of the evidentiary hearing, for about 30 days, for good cause shown; the Respondent had not objected to the continuance).

### **FINDINGS OF FACT**

1. During the very early part of the calendar year 2000, the Petitioner for the first time was named to the position, and assumed the duties, of “the Junior Governor” of the local fraternal lodge (sometimes hereinafter referred to as “the local Corporation”), a not-for-profit, West Virginia corporation created during the year 1996.

2. As the “Junior Governor” of the local Corporation, the Petitioner also had the title of “Vice-President,” according to this Corporation’s “Handbook” (at pg. 9, 9<sup>th</sup> ed. 2005), in the record as Petitioner’s Exhibit #2.

3. Consequently, commencing shortly after becoming the local Corporation’s “Junior Governor” during the year 2000, the Petitioner was listed in the official corporate records in the West Virginia Secretary of State’s Office as the Vice-President of the local Corporation.

4. However, according to pgs. 9-10 of the local Corporation’s “Handbook,” the Junior Governor’s duties are limited to certain ministerial and ceremonial functions,

without any of the typical managerial authority possessed by a “vice-president” of a non-fraternal, for-profit corporation.

5. For example, the Petitioner, as Junior Governor, did not have any check-signing authority for the local Corporation and did not prepare or directly supervise the preparation of tax returns for the Corporation.

6. Instead, the local Corporation’s “Administrator,” who is also the Corporation’s specially trained “Secretary,” must sign all of the Corporation’s checks, which must also be counter-signed by either the Treasurer or the Governor; and the “Administrator” has the duty of compiling all financial reports. Pgs. 10-11 of the “Handbook.” In addition, the Administrator is responsible for all tax filings and payments for the local Corporation, according to pg. 23 of the “Official Office Manual for the Corporation,” in the record as Petitioner’s Exhibit #3.

7. Applying the relevant provisions of the consumers’ sales and service tax regulations, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that the Petitioner had the title, only, of “vice-president” of the local Corporation, but was not involved at all in the management of the corporation by performing the duties of that office and of the corresponding office of “Junior Governor” for this Corporation.

8. Applying the withholding tax substantive and procedural law, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that (1) the Petitioner has shown that he was not one of the persons “required” to collect, account for, and pay over the withholding tax on behalf of the local Corporation, and

finds that (2) the Petitioner has shown that he did not “willfully” fail truthfully to perform any such duties.

## **DISCUSSION**

### **Consumers’ Sales and Service Tax**

With respect to the consumers’ sales and service tax, the issue is whether the Petitioner is one of the corporate officers who are personally responsible for all or any portion of the unpaid consumers’ sales and service tax liability of the corporation for the time period periods involved in the assessment of that tax in this matter.

For consumers’ sales and service tax purposes, W. Va. Code § 11-15-17 [1978] provides that “[i]f the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation” with respect to that tax.

Effective on and after July 15, 1993, the consumers’ sales and service tax legislative regulations follow the broad reach of W. Va. Code § 11-15-17 [1978] by basing corporate officer liability for unpaid corporate consumers’ sales and service tax liability upon the corporate officer’s status as a corporate officer, as long as that officer, during the assessment period(s), had any actual managerial authority on behalf of the corporation, that is, he or she was not merely an officer in name only. Under this approach, the precise duties or the breadth of the authority of the officer are not determinative. Also, corporate officer liability for the unpaid corporate consumers’ sales and service tax liability is not dependent upon the corporate officer’s knowledge of the corporation’s default in filing such tax returns or in paying such taxes. The relevant portions of the current consumers’ sales and service tax regulations provide:

Sec. 4a.5. The officers of a corporation or association that are personally liable for consumer[s] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or bylaws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who perform duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not considered to be an officer subject to a personal liability.

. . . .

Sec. 4a.5.2. An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993) (emphasis added). After reviewing these regulations, the Legislature approved them. *See* W.Va. Code § 64-7-6(rr) [1993].

In *Schmehl v. Helton*, No. 33379, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2008 W. Va. LEXIS 13 (Feb. 27, 2008), Justice Starcher, writing for a 4-1 majority of the West

Virginia Supreme Court of Appeals, upheld the corporate officer's liability for the corporation's unpaid consumers' sales and service tax. The court-authored syllabus point 3 of *Schmehl* states:

3. Under the due process protections of the *West Virginia Constitution*, Article III, Section 10, in the absence of statutory or regulatory [*sic*] language setting forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to *W. Va. Code*, 11-15-17 [1978], such liability may be imposed only when such imposition is in an individual case not arbitrary and capricious or unreasonable, and such imposition is subject to a fundamental fairness test. The burden is on the person seeking to avoid such liability to show with clear and convincing evidence, giving due deference to the statute's general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.

Very curiously, the court majority in *Schmehl*, in discussing the reach of *W. Va. Code* § 11-15-17 [1978], fails to even mention *W. Va. Code State R. §§ 110-15-4a.5 et seq.* (July 15, 1993), the above quoted legislatively approved regulations, having the force and effect of a statute, *see W. Va. Code* § 29A-1-1 [1982], and have controlling weight, *see, e.g., syl. pt. 8, Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d

366 (2007). These legislative regulations do “set[ ] forth standards for the imposition of personal liability for unpaid and unremitted sales taxes on individual corporate officers pursuant to *W. Va. Code*, 11-15-17 [1978],” quoting the language from syl. pt. 3 of *Schmehl*.

The *Schmehl* majority’s failure to mention *W. Va. Code St. R. §§ 110-15-4a.5 et seq.* (July 15, 1993), is especially surprising because: (1) that same high court referred (with apparent approval) to those legislative regulations in *Frymier-Halloran v. Paige*, 193 W. Va. 687, 691, 458 S.E.2d 780, 784 (1995) (Cleckley, J., writing the unanimous opinion); and (2) the court majority in *Schmehl*, in discussing the statute of limitations issue, discusses and applies the virtually adjacent provisions of *W. Va. Code St. R. § 110-15-4a.7.1* (July 15, 1993). In any event, the broad reach of syllabus point 3 of *Schmehl* breaks no new ground in this state but, instead, is consistent with: (1) the language utilized in *W. Va. Code § 11-15-17* [1978]; (2) *W. Va. Code St. R. §§ 110-15-4a.5 et seq.* (July 15, 1993); (3) syl. pt. 1, *Frymier-Halloran*; (4) syl. pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W. Va. 524, 170 S.E.2d 362 (1969); and (5) the published precedents of this specialized and independent state tax tribunal since the inception of our operations in January, 2003, involving corporate officer liability for the corporation’s unpaid consumers’ sales and service tax obligations.

#### Withholding Tax

With respect to the withholding tax, the issue is whether the Petitioner is one of the individuals who are personally responsible for all or any portion of the unpaid



withholding tax liability of the corporation for the time period involved in the assessment of that tax in this matter.

An employer is liable for withholding taxes withheld from employees' wages but not remitted, W. Va. Code § 11-21-75 [1990], and the withheld-but-not-remitted withholding taxes are trust fund moneys belonging to the West Virginia State Tax Commissioner. W. Va. Code § 11-10-5j [1986].

The West Virginia Tax Procedure and Administration Act, specifically, W. Va. Code § 11-10-19(a) [1978], provides (in relevant part) as follows:

Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over.

(emphasis added) For purposes of the West Virginia Tax Procedure and Administration Act, a “person” is defined by W. Va. Code § 11-10-4(b) [1979] to include a “corporation . . . and also any officer, employee or member [thereof] . . . who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article[.]” The question, then, is which persons are responsible for collecting, accounting for, and paying over a corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978], quoted previously, is derived from and is virtually identical to section 6672(a) of the Internal Revenue Code of 1986 (and its

predecessors). *See also* Treas.Reg. § 301. 6672-1 (1986). Therefore, precedents deciding issues under that federal tax provision are very persuasive in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

Generally, a “person required” to collect, account for, and pay over a withholding tax, for purposes of Internal Revenue Code § 6672(a) -- and, therefore, for purposes of W. Va. Code § 11-10-19(a) [1978] -- is any person who had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, such as deciding which corporate debts, including taxes, would be paid. *See, e.g., O’Connor v. United States*, 956 F.2d 48 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.).

Under Internal Revenue Code § 6672(a), and, therefore, under W. Va. Code § 11-10-19(a) [1978], the “willful” failure to prevent or to correct the corporation’s withholding tax default is usually the key element in deciding who is personally liable for that default. In the context of these civil penalty statutes, the term “willful” failure to collect, account for, and pay over a withholding tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, these statutes require more than a negligent failure to collect, account for, and pay over the tax. Instead, the person in question must knowingly or recklessly fail to collect, account for, and pay over the withholding tax. *See, e.g., Turpin v. United States*, 970 F.2d 1344 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993).

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed,

to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 63.1 (Apr. 20, 2003).

### **CONCLUSIONS OF LAW**

1. Under the legislatively approved consumers' sales and service tax regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

2. The Petitioner is not one of the corporate officers who are personally liable for all or any portion of the unpaid consumers' sales and service tax liability of the local Corporation for the time periods involved in the assessment of that tax in this matter

3. Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil "money penalty" (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) if he or she was "required" to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she "willfully" failed truthfully to perform these responsibilities on behalf of the corporation.

4. A person was "required" to collect, account for, and pay over a withholding

tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

5. The term “willfully” failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the withholding tax money penalty assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

6. The Petitioner is not personally liable for the unpaid withholding tax liability of the local Corporation for the time periods involved in the assessment of that tax in this matter.\*

## **DISPOSITION**

**WHEREFORE**, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers’ sales and service tax assessment issued against the Petitioner for the months of March, 1997, through July, 2000, and for the months of September, 2000, through December, 2000, for tax of \$\_\_\_\_\_, interest of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_, totaling \$\_\_\_\_\_, should be and is hereby **FULLY**

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\*This tribunal does not need to, and will not, address the issue timely raised by the Petitioner concerning the alleged bar of the state tax assessments against him due to the alleged running of the statute of limitations, because this tribunal has decided the matter fully in favor of the Petitioner on the main issue

**VACATED**, and no consumers' sales and service tax is due from the Petitioner on behalf of the local fraternal lodge for the periods in question.

It is **ALSO** the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the withholding tax money penalty assessment issued against the Petitioner for the quarterly periods ended June 30, 2000, through December 31, 2000, for tax, excluding interest and additions, of \$\_\_\_\_\_, should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of the local Corporation for the periods in question.

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of whether the Petitioner is personally responsible under substantive state law for the local Corporation's unpaid consumers' sales and service tax and withholding tax liabilities.